DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

Office of the General Counsel
Rockville, Maryland 20857

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MEMORANDUM

TO: Director, Indian Health Service

FROM: Chief, OGC/IHS Branch

SUBJECT: Ramah Navajo School Board v. Babbitt, No. 95-5334/5348 (D.C. Cir. 1996).

The United States Court of Appeals for the District of Columbia Circuit decided this case on July 2, 1996. The case involves a challenge by the Ramah Navajo School Board (RNSB) and the Puyallup Tribe to a Bureau of Indian Affairs (BIA) policy allocating contract support funds for fiscal year 1995. The court held that the BIA policy was contrary to the Indian Self-Determination Act (ISDA). While this Department and the IHS were not involved in the case, this decision has potential implications for the IHS with respect to allocation of contract support funds for tribal contracts and compacts under the ISDA.

As background I note that the BIA determines contract support costs for BIA programs by applying the tribe's indirect cost rate to the BIA's share of the tribe's program base. The tribe's indirect cost rate is determined through an annual negotiation process with the Interior Office of the Inspector General. If, for example, the tribe would receive $1 million in total funding from the BIA and other federal and state agencies (program base), and the tribe's administrative costs for these programs were $200,000, then the tribe would have an indirect cost rate of 20%. If the BIA's share of the tribe's program base were $800,000, then applying the indirect cost rate to the BIA share of the program base would mean that the tribe would receive $160,000 in BIA contract support costs (20% x $800,000) if the BIA had sufficient contract support funds to provide the tribe with full contract support funding.

The controversy underlying this case stemmed from an appropriations shortfall with respect to contract support funds for the BIA. The BIA identified a projected need of $105 million for fiscal year 1995 to fund fully contract support costs for all eligible tribes. The Interior Appropriations Act for fiscal year 1995 placed a cap of not to exceed $95 million for contract support, thus creating a funding shortfall. The BIA adopted a policy to deal with this shortfall and published the policy in the Federal Register in November of 1994.

The BIA policy was designed to encourage tribes to submit proposals for their 1995 indirect cost rates to the Inspector General by June 30, 1995. This would allow for distribution of the shortfall based upon current 1995 indirect cost rates. Tribes which submitted their proposals by June 30

would receive full contract support funding subject to a pro-rata reduction if funds proved insufficient. Tribes which did not submit proposals by June 30 would receive 50% of what would otherwise be full contract support funding based on their 1994 rate. The Ramah Navajo School Board and the Puyallup Tribe, along with 44 other tribes, missed the June 30 deadline and thus received the 50% reduction based upon 1994 rates. The tribes which met the deadline received approximately 92% of what would otherwise be full funding based upon 1995 rates because of a pro-rata reduction.

The RNSB and the Puyallup Tribe sued to enjoin distribution of the contract support funds in accordance with the BIA policy. The district court denied their motion for a preliminary injunction. Relying on the Supreme Court's decision in Lincoln v. Vigil, 113 S. Ct. 2024 (1993), the court held that the allocation of insufficient appropriations in this case was committed to agency discretion by law and thus was not judicially reviewable. The district court viewed the following proviso at subsection 106(b)(5) of the ISDA, 25 U.S.C. 450j-1(b)(5), as committing distribution of this appropriations shortfall to Secretarial discretion:

> Notwithstanding any other provision in this Act, the provision of funds under this Act is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this Act.

The district court (and the dissenting judge on the three judge court of appeals panel) viewed this proviso as making a tribe's legal entitlement to contract support funds ("the provision of funds") dependent on Congress making full appropriations. In their view, the effect of the proviso was to make provisions of the ISDA mandating full funding inapplicable in a shortfall situation. Nor was the Secretary legally obligated to take funds from programs, projects, or activities serving a tribe to make contract support funds available for another tribe. Thus, they concluded that the proviso left allocation of this appropriations shortfall to the discretion of the Secretary. The BIA policy was not judicially reviewable because there was no substantive law to apply.

The two judge majority on the court of appeals emphasized the mandatory nature of contract support in section 106(a((2) of the ISDA: "There shall be added to the amount required by paragraph (1) contract support costs . . .". The majority noted that the ISDA in section 106(g), 25 U.S.C. 450-1(g), refers to contract support as an "entitlement." Slip Opinion at p. 4. Section 106(g) states:

> Upon the approval of a self-determination contract, the Secretary shall add to the contract the full amount of funds to which the contractor is entitled under section 106(a), subject to adjustments for each subsequent year that such tribe or tribal organization administers a Federal program, function, service, or activity under such contract.

The majority viewed the BIA practice (described above) of equating full contract support funding with the agency's share of indirect costs as "a strict and detailed funding formula" required by the ISDA. Slip Opinion at p. 12. While the majority did not specify what particular provision in the ISDA required this "strict and detailed funding formula," plaintiffs in their legal briefs relied heavily on Senate Report No. 100-274 which accompanied S. 1703, the Senate Bill which initiated the 1988 amendments to the ISDA.

The Senate Bill (S. 1703) described funding for self-determination contracts strictly in terms of direct program and indirect costs and required full payment of indirect costs. In a passage understandably not relied upon by plaintiffs, the Senate Report at page 18 indicated that the Senate Bill required use of the indirect cost system described in OMB Circular A-87 for administrative costs associated with self-determination contracts and emphasized that the Senate Bill "call[ed] such costs 'indirect costs' instead of 'contract support costs,' a term that cannot be operationally defined." (Emphasis added).

It is important to note that the funding section in S. 1703 was substantially changed by the House before passage by the Congress. Among other things, the House substituted the concept of "contract support costs" for the strict indirect cost approach described in the Senate Report relied on by plaintiffs and added the proviso at subsection 106(b)(5) quoted above. In addition, the 1994 Amendments added provisions to section 106 that broadened the description of contract support costs. Nevertheless, the majority on the court of appeals, without pointing to any specific statutory provision, determined that Congress intended to bind the Secretary to a strict indirect cost "formula" approach for full funding of contract support.

Having made this determination, the majority interpreted the proviso at subsection 106(b)(5) as not excusing the Secretary from following as closely as possible the full funding formula. "Thus, we read the subject-to-availability-of-funds provision to mean precisely what it says: the Secretary need only distribute the amount of money appropriated by Congress under the Act, and need not take money intended to serve non-CSF purposes under the ISDA in order to meet his responsibility to allocate CSF." Slip opinion at p. 13. The majority held that: "The Act informs the Secretary exactly how the full funding should be allocated, and that method provides a meaningful standard by which to review the Secretary's dissemination of the insufficient funds as well. . . [A]n insufficient appropriation fails to excuse an agency from its obligation to follow as closely as possible the allocation plan Congress designed in anticipation of full funding." Slip opinion at p. 18.

The majority did not specify precisely what was required by its "as closely as possible" test, but noted that the obligation to preserve the allocation formula provided by the statute for full funding "militates toward the imposition of a pro rata reduction among all the eligible Tribes based on their most recent indirect cost ratio filings." Slip opinion at p. 18-19. In a footnote the majority did expressly leave open the possibility that the Secretary might come up with an alternative to pro-rata distribution of the shortfall, so long as he remains within the boundaries of the limited discretion delegated to him by the Act. Slip opinion at p. 15, nt. 11.

While the majority held out the possibility of an alternative approach other than pro-rata for allocating contract support funds in a shortfall situation, the majority clearly favored a pro-rata allocation as "easily" effectuating the ISDA scheme and in accord with appropriations committee directives. Slip opinion at p. 19. In addition, the majority indicated that the Secretary's discretion was substantially restricted by section 107 of the ISDA. "Any discretion in the Secretary to propose an alternative distribution plan which, like a pro-rata reduction, would honor the CSF provisions in the ISDA, is further restrained by language in the Act which specifically prohibits the Secretary from 'promulgating any regulation' or 'impos[ing] any nonregulatory requirement,' except with respect to certain enumerated topics." Slip opinion at p. 19. In this regard, the majority held that the BIA policy, in that it imposed a penalty on non-complying tribes, was a de facto regulation prohibited by section 107 of the ISDA, 25 U.S.C. 450k.

One need only juxtapose the IHS contract support policy with the majority's indirect cost "formula" approach described above to see that this court decision could have major potential implications for how the IHS determines and allocates contract support funding. While the IHS was not involved in this particular case, the court's decision will undoubtedly be cited in any litigation challenging the IHS policy. Consequently, I recommend that a meeting be scheduled to discuss the decision and its potential ramifications for the IHS.

Duke McCloud